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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 123

MRS. FAY M. HOSHMAN, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS OF RUSSELL M. HOSHMAN,

Petitioner,

versus

ESSO STANDARD OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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versus

ESSO STANDARD OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mrs. Fay M. Hoshman, individually and as Natural Tutrix of her minor children, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fitfth Circuit in the above entitled case.

Opinions Below

No opinion of the District Court in Hoshman v. Esso Standard Oil Company was written; the opinion of the Fifth Circuit Court of Appeals in this case (Appendix "A", *infra*, pp. 23-28) is reported at 263 F. 2d 499.

Jurisdiction

The judgment of the Fifth Circuit Court of Appeals in *Hoshman* v. *Esso Standard Oil Company,* was entered January 30, 1959, (Appendix "B", *infra,* pp. 29); rehearing was denied March 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

Questions Presented

1. Whether the court below violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh Amendment of the Federal Constitution in dismissing the complaint in this case.

2. Can a motion to dismiss be granted when it is shown that plaintiff is entitled to relief under facts which may be proved in support of the allegations of her petition.

3. Under Louisiana statutes, did the Louisiana Federal court have the right to dismiss a complaint under which proof could be offered that an employee's death by electrocution on high tension wires was caused by the deliberate withdrawal of the guards posted to protect him and the intentional failure of his employer to notify him of this, on the theory that this deliberate withdrawal and intentional failure to notify were mere negligent acts which left the employee to his remedy under the state compensation act, and did not constitute such fraud as vitiated and invalidated the presumed agreement on the part of the employee to be governed by the compensation act?

4. Can the petitioner, Mrs. Hoshman, be denied trial by jury in a Federal court when under the Federal Rules of Civil Procedure a complaint is not subject to dismissal unless it appears to a certainty that petitioner cannot

possibly be entitled to relief under any set of facts which could be proved in support of its allegations?

5. Did the Federal court in this case where Federal jurisdiction rests on diversity of citizenship have the right to apply a Louisiana state test of "sufficiency of the pleadings" to the allegations of petitioner's complaint?

Constitutional Provisions

The constitutional provision involved is Amendment VII found in U. S. C. A., Constitution, page 379. It reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,— * * *".

Federal Rules of Civil Procedure

Rule 8 (a) *Claims for Relief.* "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

Statutes Involved

Article 1819, Louisiana Civil Code:

> "Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied,

as is provided in the preceding paragraph, but also where it has been produced by—

"Error;
"Fraud;
"Violence;
"Threats."

Article 1823, Louisiana Civil Code:

"Errors may exist as to all the circumstances and facts which relate to a contract, but it is not every error that will invalidate it. To have that effect, the error must be in some point, which was a principal cause for making the contract, and it may be either as to the motive for making the contract, to the person with whom it is made, or to the subject matter of the contract itself."

Article 1832, Louisiana Civil Code:

"In all cases, however, when the information which would have destroyed the error, has been withheld by the other party to the contract, it comes under the head of fraud, and invalidates the contract."

Sec. 1847, Louisiana Civil Code:

"*Fraud, definition; elements of fraud.*

"Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantages to the one party, or to cause an inconvenience or loss to the other. From which definition are drawn the following rules:

"1. Error is an essential part of the definition; an article [artifice] that can not deceive can have no effect in influencing the consent, and can not injure the validity of the contract.

"2. The error must be on a material part of the contract, that is to say, such part as may reasonably be presumed to have influenced the party in making it; but it needs not be

the principal cause of the contract, as it must be in the case of simple error without artifice.

"3. A false assertion as to the value of that which is the object of the contract, is not such an artifice as will invalidate the agreement, provided the object is of such a nature and is in such a situation that he, who is induced to contract by means of the assertion, might with ordinary attention have detected the falsehood; he shall then be supposed to have been influenced more by his own judgment than the assertion of the other.

"4. But a false assertion of the value or cost, or quality of the object, will constitute such artifice, if the object be one that requires particular skill or habit, or any difficult or inconvenient operation to discover the truth or falsity of the assertion. Sales of articles falsely asserted to be composed of precious metals, sales of merchandise by a false invoice, of any article by a false sample, of goods in packages or bales, which can not without inconvenience be unpacked or inspected, or where the party making the sale avoids the inspection with intent to deceive, of goods at sea or at a distance, are, with others of a like nature, referable to this rule.

"5. It must be caused or continued by artifice, by which is meant either an assertion of what is false, or a suppression of what is true, in relation to such part of the contract as is stated in the second rule.

"6. The assertion and suppression, mentioned in the last preceding rule, mean not only an affirmation or negation by words either written or spoken, but any other means calculated to produce a belief of what is false, or an ignorance or disbelief of what is true.

"7. The artifice must be designed to obtain either an unjust advantage to the party for whose benefit the artifice is carried on, or a loss or inconvenience to him against whom it is practiced, although attended with advantage to no one.

"8. It is not necessary that either of the effects mentioned in the last preceding rule should have actually been produced; it is sufficient to constitute the fraud, that such would be the effect of the contract, if it were actually performed.

"9. If the artifice be practiced by a party to the contract, or by another with his knowledge or by his procurement, it vitiates the contract; but if the artifice be practiced by a third person, without the knowledge of the party who benefits by it, the contract is not vitiated by the fraud, although it may be void on account of error, if that error be of such a nature as to invalidate it; in this case the party injured may recover his damages against the person practicing the fraud.

"10. In the words 'loss or inconvenience' which may be suffered by the party, is included the preventing him from obtaining any gain or advantage, which, without the artifice, he might have obtained.

"11. If the advantage to be gained by the party, in favor of whom the artifice is practiced, gives him no unjust advantage, that is to say, no advantage at the expense of the other party, and this latter would neither suffer inconvenience nor loss in consequence of the deception, if the contract were performed, the artifice does not vitiate it.

"12. Combinations with respect to sales to enhance the price by false bids or offers, or to depress it by false assertions, are artifices, which invalidate the contract, when practiced by those who are parties to it, or give rise to an action for damages where they are not."

Sec. 2315, Louisiana Civil Code:

Torts– Liability--Survival of action.

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; . . ."

Section 23-1032, Louisiana Revised Statutes.

"Exclusiveness of rights and remedies; employer's liability to prosecution under other laws.

"The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents or relations.

"Nothing in this Chapter shall affect the liability of the employer to a fine or penalty under any other statute."

Section 23—1039 Louisiana Revised Statutes. *Employment Contracts; Presumption of Election as to Coverage*

"Every contract of hiring, verbal, written or implied, between an employer and an employee engaged in any trade, business or occupation specified in R.S. 23:1035 or engaged in any trade, business or occupation that may be determined to be hazardous under the provisions thereof, shall be presumed to have been made subject to the provisions of this Chapter, unless there is as a part of the contract an express statement in writing, either in the contract itself or by written notice by either party to the other, that the provisions of this Chapter other than R.S. 23:1042 and R.S. 23:1043 are not intended to apply; and it shall be presumed that the parties have elected to be subject to the provisions of this Chapter; and to be bound thereby, unless such election is terminated as hereinafter provided."

Statement

Petitioner, Mrs. Fay M. Hoshman, individually and as Natural Tutrix of her minor children, brought this action for damages for the death of her husband, under Article 2315 of the Louisiana Revised Civil Code. Her complaint alleges that Russell M. Hoshman, her husband, was fatally injured while guiding a pipe which was being moved by a crane at the manufacturing plant in Baton Rouge, La. Gross and wanton acts of negligence were alleged, such as failing to provide proper safeguards; in failing to maintain proper lookout for the operation of the crane; and in ordering Russell M. Hoshman to hold onto said pipe well knowing the close proximity of high powered lines and failing to warn him of the dangers involved. The complaint further alleges that the defendant, Esso Standard Oil Company, concealed said facts from

her husband and that he was not informed of the extra hazards connected with his employment and was not informed that no precautions or provisions were made to protect him and that the concealment of such hazards by the employer constituted fraud vitiating the presumed agreement of the deceased to be governed by the compensation laws of the state of Louisiana.

On the trial of this cause the facts will show that the Esso Standard Oil Company previously had lookouts stationed along the high powered line to warn Hoshman and others of such dangers, in moving the pipe. For some reason best known to the defendant, these lookouts or flagmen were removed from their position the day before this fatal accident occurred.

The defendant filed a motion to dismiss on the grounds that the complainant's remedy is exclusively provided by the Louisiana Workmen's Compensation Act.

Honorable J. Skelly Wright, Trial Judge, granted defendant's motion to dismiss and rendered a judgment rejecting the demands of the complainant and dismissed her suit with costs. Complainant timely filed an appeal to this Honorable Court from that judgment; the Fifth Circuit Court of Appeals affirmed.

Reasons for Granting the Writ

Since the right of jury trial is fundamental, the court should indulge every reasonable presumption against waiver. The court below is bound by the Seventh Amendment guaranteeing trial by jury. If the evidence is conflicting, this amendment requires a jury decision. In considering a motion to dismiss, if any facts that may be proved would entitle the plaintiff to relief, this amendment requires a decision by a jury. The action of the court below in

dismissing this complaint violated plaintiff's constitutional rights.

The Fifth Circuit Court of Appeals, in affirming the motion to dismiss, based its decision on an application of the rules of the courts of Louisiana in judging the sufficiency of the allegations of a complaint, concluding that under Louisiana law, the petitioner's sole remedy lay in Workmen's Compensation benefits.

The substantive law of Louisiana does permit an action such as the one herein to be brought and it was error for the Court of Appeals to employ the standards of the Louisiana courts instead of those prescribed by the Federal Rules of Civil Procedure, and applied in countless decisions of the Fifth Circuit and other Circuit Courts of Appeal.

I. The Substantive Law of Louisiana Permits This Action To Be Brought

The Louisiana Workmen's Compensation Act (LRS 23:1032) provides that the rights and remedies granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation shall be exclusive of all other rights and remedies of such employee, his personal representative, dependents or relations. This Act also provides that every contract of hiring, verbal, written or implied between an employer and employee engaged in a hazardous occupation shall be presumed to have been made subject to the provisions of the Act and it is to be presumed that the parties have elected to be subject to the provisions of the Workmen's Compensation Act (LRS 23:1039).

The Workmen's Compensation Act deals with and has application to accidental injuries arising out of and in the course of employment and not to an intentional act by an employer when that act has serious and tragic consequences

as it had in the instant case. The intentional act of concealing from the decedent employee, certain facts and conditions of his employment, of not informing him of the extra hazards connected with his employment; not informing him that no precautions or provisions were being made to protect him and in failing to maintain proper lookout for the operation of the crane and in ordering him to move the pipe, well knowing the close proximity to the high powered line, amounted to fraud which vitiated the presumed agreement of the deceased to be governed by the Workmen's Compensation Laws of the State of Louisiana. The defendant owed the decedent the duty of providing him with a safe place to work; of not permitting extra hazardous conditions to exist; in providing and continuing to provide a warning of the dangers involved; and the violation of duties of such nature constitutes fraud. Fraud is any cunning deception or artifice used to circumvent, cheat, or deceive another. *Hill* v. *Maguire, 19 La. App. 798, 140 So. 169 (1932).* Fraud comprises all acts, omissions, and concealments involving breach of legal or equitable duty, resulting in damage to another. *Thieme* v. *Collier, 13 La. App. 651, 128 So. 730 (1930).* See Article 1847 of Louisiana Civil Code.

Article 1819 of the Louisiana Civil Code reads as follows:

> "Art. 1819. Consent being the concurrence of intention in two or more persons, with regard to a matter understood by all, reciprocally communicated, and resulting in each party from a free and deliberate exercise of the will, it follows that there is no consent, not only where the intent has not been mutually communicated or implied, as is provided in the preceding paragraph, but also where it has been produced by—
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Article 1832 of the Louisiana Civil Code reads as follows:

> "Art. 1832. In all cases, however, when the information, which would have destroyed the error, has been withheld by the other party to the contract, it comes under the head of fraud, and invalidates the contract."

Fraud may be committed by suppressing the truth as well as by deliberate misstatement of the facts. *Citizens Bank & Trust Company of Ruston* v. *Cook (1928), 9 La. App. 540, 121 So. 306; Faulk* v. *Hough (1859), 14 La. App. 659; Griffing* v. *Atkins, 1 So. (2d) 445 (1941).* The defendant employer in this case was guilty of such fraud and concealment in failing or refusing to inform the decedent employee of daugers and hazards known to the employer and not known to the employee which vitiated and invalidated any presumed agreement on the part of the employee to be governed by the compensation act.

Unquestionably the substantive law of Louisiana provides that if there be error, fraud or concealment in an agreement, a party's consent is vitiated, or never came into being. Articles 1819, 1823, 1832, Louisiana Civil Code.

Moreover, Louisiana courts have held that facts relating to negligent acts of the employer closely similar to those in the case at bar, allege a cause of action. In two cases involving employees' suits against their employers, the plaintiffs *first alleged facts showing the Workmen's Compensation Act was inapplicable; then alleged acts of negli-*

gence by the defendant employers which rendered the employer liable in tort. The courts held that the compensation laws did not apply, and made the following observations regarding the allegations of negligent acts in holding them sufficient to state a cause of action:

> "According to the petition's allegations of facts, plaintiff was injured as a result of *gross negligence on the part of the defendant, particularly in that it failed in its duty to provide a safe place in which to perform his work or to furnish safe guards that would protect him from injury.* Furthermore, there is nothing in the petition to indicate that the injuries and disability resulted from a failure of duty on plaintiff's part or from other reasons appropriate to special defenses in actions of this kind." (Emphasis supplied)
>
> *Clark* v. *Southern Kraft Corporation, La. App., 200 So. 489 at page 492.*

> "Summarizing, plaintiff charges defendant with a certain duty to him as its servant, that that duty was breached, and that, as a result of its breach, he has suffered injury for which he should be compensated in damages. *Under the well-recognized doctrine that the master is bound to furnish his servant with a safe place in which to work and to provide him with safe and adequate implements and appliances with which to do his work, the petitions disclose a cause of action.*" (Emphasis supplied).
>
> *Faulkner* v. *Milner-Fuller, Inc., La. App., 154 So. 507, at page 510.*

Petitioner's case closely parallels the two cases quoted above in its essentials: first, petitioner wishes to show that the presumed agreement to be governed by Workmen's Compensation never came into being or was annulled as a result of the fraud, error or concealment pursuant to the pertinent codal articles; second, petitioner will show that

the defendant employer in negligently failing to provide the deceased with a safe place to work and adequate implements to safeguard him from injury, proximately caused the death of the decedent, in conformity with the standards of evidence and proof under Article 2315. It appears that the substantive law of Louisiana does indeed contain provisions which would allow plaintiff to seek recovery.

II. The Fifth Circuit Court of Appeals erred in applying the test of Louisiana Courts in judging the sufficiency of allegations of a complaint, instead of the criteria embodied in the Federal Rules of Civil Procedure.

Since the law of Louisiana provides for the bringing of an action such as petitioner has instituted the only possible justification for the dismissal of this case is that, it appears beyond doubt that the petitioner can prove no facts in support of her claim which would entitle her to relief, see *Conley* v. *Gibson*, 1957, 355 U.S. 41, 78 Sup. Ct. 99, 2 L.Ed. 2d 80. Petitioner has alleged in her complaint that the defendant concealed the dangerous working conditions from Russell M. Hoshman and that the concealment of such extra hazards by the defendant constituted fraud vitiating the presumed agreement of the deceased to be governed by the Workman's Compensation Laws of the State of Louisiana. In addition, petitioner alleged that these acts proximately caused the death of the decedent. See Appendix "E", paragraphs 9, 10 and 11, *infra*, pp. 32-36. Such allegations are in conformity with Art. 2315 of the La. Civil Code which casts and damages every man whose fault causes injury to another.

Concerning these allegations of concealment and fraud, as well as fault or negligence, it will be noted that Rule 8 (a) of the Federal Rules of Civil Procedure prescribes notice pleadings; there is no requirement of a detailed statement of fact. It has been held that cases in federal court

consist not in pleadings but evidence, *Carss* v. *Outboard Marine Corp., 1958, 5th Cir., 252 F. 2d 690.*

Petitioner submits that the 5th Cir. Ct. of Appeals erred in affirming the dismissal of the complaint herein and due to its erroneous application of the rules of Louisiana Courts in judging the sufficiency of allegations of a complaint instead of employing the standards set forth in the Federal Rules of Civil Procedure and followed in numerous cases.

This test of sufficiency of a complaint on a motion to dismiss in Federal courts can in no way be likened to the procedure followed in the state courts of Louisiana, in considering an exception of no cause of action. The Fifth Circuit Court of Appeals has long recognized this fundamental difference and has had occasion to make forceful pronouncements on the point in the case of *Millet* v. *Godchaux Sugars, 5 Cir., 1957, 241 F.2d 264, 265:*

> "A principle, repeated with remarkable frequency in the plainest terms of direct simplicity, and carrying with it a compelling sense of emphasis, has again been misread, misunderstood, or misapplied, requiring again its republication. For the District Court, indicating no basis for departure from the rule, '* * * that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim * * *,' Des Isles v. Evans, 5 Cir., 200 F. (2d) 614, 615, dismissed Millet's Complaint seeking Workmen's Compensation under the Louisiana Statute *by testing it as would a Louisiana Court on whether it (i.e., the pleaded words) stated a cause of action and not, as* must a Federal Court, whether evidence might be presented on which, applying Louisiana substantive standards, a recovery might be had. * * *
> (p. 267):

"Whether there were a compensable injury and, if so, the physical, medical or psychic-mental disability resulting from it were matters which had to be determined by proof. The cause must therefore be reversed and remanded for further and not inconsistent proceedings. *In that process, it will be the function of the Judge to determine on the evidence (not on the pleadings), by motion for summary judgment, directed verdict or other appropriate means whether, under the controlling substantive jurisprudence of Louisiana, the evidence is sufficient to raise a genuine issue of fact.*" (Emphasis supplied). *Millet* v. *Godchaux Sugars, supra, at page 265 and page 267.*

The *Millet* case stated precisely the Louisiana rule pertaining to criteria employed in passing on an exception of no cause of action as has been explained in the following Louisiana decisions:

"An exception of no cause of action addresses itself to the sufficiency in law of the petition and exhibits attached thereto. *It is triable on the face of the papers.* See *Trumbaturi* v. *Katz & Besthoff*, 180 La. 915, 158 So. 16; *Rome* v. *London & Lancashire Indemnity Co.*, 181 La. 630, 160 So. 121 and other cases, too numerous to mention. In determining whether the exception is well founded, the court does not consider the evidence submitted in support of the petition, except in cases where the exception is filed after evidence has been taken and the allegations of the petition have been enlarged by such evidence which has been received without objection." (Emphasis supplied).

Bartholomew v. *Impastato*, La. App., 12 So. (2d) 700, 702 (1943).

"It is well settled that an exception of no cause of action addresses itself to the sufficiency in law of the petition and is triable on the face of the papers;

that for the purpose of determining the issues raised by such an exception the well pleaded facts contained in the petition must be accepted as true; and that a suit will not be dismissed on exception of no cause of action if allegations of fact set forth a cause of action as to any part of the demand. *Smith* v. *Kennon*, 188 La. 101, 175 So. 763; *Adkins' Heirs* v. *Crawford, Jenkins & Booth*, 200 La. 561, 8 So. 2d 539; *Ingersoll Corporation* v. *Rogers*, 217 La. 79, 46 So. 2d 45; *Kennedy* v. *Perry Timber Co.*, 219 La. 264, 52 So. (2d) 847; *Ane* v. *Ane*, 225 La. 222, 72 So. (2d) 485."

Spiers v. *Davidson*, 233 La. 239, 96 So. (2d) 502, 503 (1957).

See also:

Outdoor Electric Advertising v. *Saurage*, 207 La. 344, 21 So. (2d) 375;
Termini v. *McCormick*, 208 La. 221, 23 So. (2d) 52;
Roy O. Martin Lumber Co. v. *Saint Denis Securities Co.*, 225 La. 51, 72 So. (2d) 257;
Wischer v. *Madison Realty Co., Inc.*, 231 La. 704, 92 So. (2d) 589;
Leteff v. *Maryland Casualty Co.*, La. App., 82 So. (2d) 80.

Hence, a Louisiana judge in ruling on an exception of no cause of action has but one duty; that is, he must scrutinize the allegations of the petition, and determine whether these particular allegations of fact, which are assumed to be true, state a cause of action. There can be no determination that such a cause of action exists if plaintiff might be entitled to relief under *any* set of facts which he might prove as in Federal courts. The only fact which can give rise to a cause of action are those facts contained in the petition.

The operation of the La. rule is illustrated in *Brooks* v. *American Mutual Liability Insurance Co.*, La. App., 7 So. (2d) 658 (1942), wherein the plaintiff alleged facts showing that the deceased's implied consent to be governed by the Workmen's Compensation Statute had been vitiated by fraud and concealment perpetrated on him by his employer rendering the employer liable in tort. The court summarized the allegations of the petition and concluded that the exception of no cause of action must be maintained for these reasons:

> "Assuming for the sake of argument that an employer could be guilty of such fraud and concealment in failing or refusing to inform his employee of dangers and hazards known to the employer and not known to the employee as to vitiate and invalidate any presumed agreement on the part of the employee to be governed by the compensation act (*on which point we express no opinion*), *there was no such fraud or concealment alleged in the petition in this case.*" (Emphasis supplied).
>
> *Brooks* v. *American Mutual Liability Insurance Company, supra*, 7 So. 2d 658, at page 660.

Another case in which the plaintiff alleged the same theory of recovery is *Boyd* v. *American Mutual Liability Insurance Company*, La. App., 11 So. (2d) 102, (1942), which cites the *Brooks* case and likewise sustains the exception of no cause of action.

In refusing to recognize the causes of action in the *Brooks* and *Boyd* cases, the court did NOT base its holdings on the fact that the substantive law of La. excludes such claims. On the contrary, there is an implication in the opinion of the *Brooks* case that such an action might be allowed *if the proper facts were alleged.*

By ruling against the plaintiffs in these cases, the Louisiana court was saying, in effect: "Possibly our law

provides the relief sought by these plaintiffs, provided sufficient allegations of fact are made; however, such allegations are not contained in the petitions before us at this time. It is entirely within the realm of possibility that the very next plaintiff bringing a similar claim will allege sufficient facts as will show 'such fraud' as would vitiate the agreement to be governed by the compensation law, and we shall accord him an opportunity to seek recovery."

The difference between the Federal criteria and those of the various states in passing upon the sufficiency of allegations of a complaint was commented upon in *Black* v. *The First National Bank of Mobile, Ala.* (1958), 5 Cir., 255 Fed. (2d) 373, 375, wherein the District Court was reversed and the case remanded under a decision that a complaint alleged a cause of action. Language from *Byrd* v. *Bates*, 5 Cir., 220 F. (2d) 480, at page 482 is quoted in the opinion:

> "As we said in *John Walker and Sons* v. *Tampa Cigar Co.*, 5 Cir., 197 F. (2d) 72, 73, 'Rule 8 of the Federal Rules of Civil Procedure, 28 USCA, provides that a pleading shall set forth a short, plain statement of the claim showing that the pleader is entitled to relief. * * *. Absent from this rule is the old requirement of common law and code pleading that the pleader set forth "facts" constituting a cause of action. It is also elementary that a complaint is not subject to dismissal unless it appears to a certainty that the plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. *Even then, a court ordinarily should not dismiss the complaint except after affording every opportunity to the plaintiff to state a claim upon which relief might be granted.*'" (Emphasis supplied).
>
> *Black* v. *First National Bank of Mobile, Ala., supra*, at page 375.

The marked contrast between the Federal rule and the Louisiana practice of trying an exception of no cause of action "on the papers" is obvious from a reading of *Carss* v. *Outboard Marine Corporation*, 1958, 5 Cir., 252 F. (2d) 690:

> " 'Under Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. The cases are generally to be tried on the proofs rather than the pleadings.' *Des Isles* v. *Evans*, 5 Cir., 200 F. 2d 614, 616; *De Loach* v. *Crowley's, Inc.*, 5 Cir., 128 F. 2d 378, 380; *Conley* v. *Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed. (2d) 80."
>
> *Carss* v. *Outboard Marine Corporation, supra*, at page 691.

This self-same unwillingness of Federal courts to deny plaintiffs the right to present their cases is shown in these late decisions:

Knudsen v. *Torrington*, 1958, 2 Cir., 254 F. (2d) 283;
Angel Creek Logging Co. v. *Atlas Plywood Corp.*, 1957, 22 F. R. D. 1;
Central Ice Cream Co. v. *Golden Rod Ice Cream Co.*, 1958, 7 Cir., 257 (2d) 417;
City of Daytona Beach v. *Gannett Fleming Corddry & Carpenter*, 1958, 5 Cir., 253 F. (2d) 771.

In *Dotschay* v. *Nat'l Mutual Life Ins. Co.*, 1957, 246 F. 2d 221, the Fifth Circuit Court of Appeals was again constrained to reverse a District Court and make the following observation:

> "It seems to us that the district court overlooked our liberal rule of federal practice under which the complaint is not to be dismissed because the plaintiff's lawyer has misconceived the proper legal theory of the

claim, but is sufficient if it shows that the plaintiff is entitled to *any relief which the court can grant, regardless of whether it asks for the proper relief.*[5]"

"[5] Rules 8(a), (2), 12(b), (6) and 54(c), Federal Rules of Civil procedure, 28 U.S.C.A.: *Keiser* v. *Walsh*, 73 App. D.C. 167, 118 F. (2d) 13, 14; *Kansas City St. L. & C. R. Co.* v. *Alton R. Co.*, 7 Cir., 124 F. (2d) 780, 783; *Hawkins* v. *Frick-Reid Supply Corporation*, 5 Cir. 154 F. (2d) 88, 89; *Schoonover* v. *Schoonover*, 10 Cir., 172 F. (2d) 526, 530; *Blazer* v. *Black*, 10 Cir., 196 F. (2d) 139, 147; *Hutches* v. *Renfroe*, 5 Cir., 200 F. (2d) 337, 340; *Diggers* v. *Bus. Men's Assur. Co. of America*, 5 Cir., 219 F. 2d 292, 297; 6 Moore's Fed. Prac., 2nd Ed., Para. 54, 60, pp. 1203, 1204." (Emphasis supplied).

Dotschay v. *Nat'l Mutual Life Ins. Co. supra*, at page 223.

This Court has also recognized and set forth the significance and proper use of the motion to dismiss in *Conley* v. *Gibson, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed (2d) 80,* which involved an action for a declaratory judgment and other relief dismissed by the District Court, affirmed by the Court of Appeals, 5 Cir., 229 F. (2d) 436. On certiorari to this court, the case was reversed and remanded to the District Court with directions. In its opinion, the Court held:

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

"See, e.g. *Leimer* v. *State Mutual Life Assur. Co.*, 8 Cir., 108 F. (2d) 302; *Dioguardi* v. *Durning*, 2 Cir., 139 F. (2d) 774."

Conley v. *Gibson*, supra, 355 U.S. 41 at p. 45.

Conclusion

It is important, in order than trial by jury may be preserved as intended by the Seventh Amendment to the Constitution of the United States, that this court shall grant certiorari and determine whether the court below could dismiss a complaint when, under facts that could be proved thereunder, petitioner may be entitled to the relief he seeks.

Since it has been shown that the substantive law of Louisiana does allow the bringing of an action such as petitioner has instituted, and further that petitioner is entitled to relief under facts which can be proved in support of her allegations, it is submitted that the decision of the court below, Fifth Circuit Court of Appeals, is in error and in conflict with its own prior decisions, decisions of other Circuit Courts of Appeal as well as those of this Court.

In order to reaffirm the unwavering line of jurisprudence on this point, in applying the Federal Rules of Civil Procedure and thereby allowing petitioner her day in court, at which time she will be given an opportunity to prove her case, petitioner prays that a writ of certiorari issue to the Fifth Circuit Court of Appeals to the end of reviewing its erroneous judgment herein.

Respectfully submitted,

WARREN E. MILLER,
Suite 1012, Barr Building,
910 Seventeenth Street N.W.,
Washington, D.C.;

H. ALVA BRUMFIELD,
205 American Bank Building,
Baton Rouge, Louisiana.
Attorneys for Mrs. Fay M. Hoshman,
individually and as Natural Tutrix of
her minor children, Petitioner.

Proof of Service

I, Warren E. Miller, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on Messrs. A. M. Curtis, P. A. Casey, J. M. Carville, Wilson B. Holcombe, opposing counsel, P. O. Box 711, Baton Rouge, Louisiana.

Dated this 17th of June, 1959.

WARREN E. MILLER.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17298

MRS. FAY M. HOSHMAN, ETC., et al., Appellants,

versus

ESSO STANDARD OIL COMPANY, Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(January 30, 1959.)

Before HUTCHESON, Chief Judge, CAMERON, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: Russell Hoshman was killed in an industrial accident. His widow, individually and as natural tutrix of her minor children, sued Esso Standard Oil for damages under the general tort article of the Louisiana Civil Code.[1] Esso filed a motion to dismiss the complaint on the ground that the plaintiff's remedy is provided for exclusively in the Louisiana Workmen's Compensation Act.[2] The district court granted defendant's motion and dismissed plaintiff's suit. We affirm.

Hoshman was an apprentice pipefitter at Esso's refinery in Baton Rouge, Louisiana. He was electrocuted while holding and guiding a pipe that was being moved

[1] Article 2315 of the Louisiana Civil Code of 1870 provides in part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; . . ."

[2] "La. R.S. 23:1032. Exclusiveness of rights and remedies; employer's liability to prosecution under other laws.

'The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents or relations.

'Nothing in this Chapter shall affect the liability of the employer to a fine or penalty under any other statute."

by a crane. The pipe came in contact with an overhead power line carrying 13,800 volts of electricity.

One of the theoretical bases for the Workman's Compensation laws is the presumption of an agreement between employer and employee arising from the fact of employment. In accordance with this imaginary agreement the parties consent to be governed exclusively by the Act, particularly with reference to recovery of damages for injuries. The plaintiff seizes this convenient fiction and grapples to it the idea that the presumed agreement, like any other contract, is vitiated by fraud. In this case, so the argument runs, there was fraud since the employer "concealed . . . the extra hazards connected with [Hoshman's] employment".

In two Louisiana cases the court indulges in assumptions that support the plaintiff's position: *Brooks v. American Mutual Liberty Insurance Co.*, Ct. App. La., 1942, 7 So. 658 and *Boyd v. American Mutual Liability Insurance Co.*, Ct. App. La., 1943, 11 So. 2d 102. In Brooks the Court assumed "for the sake of the argument that an employer could be guilty of fraud and concealment in failing to inform his employee of dangers and hazards known to the employer and not known to the employee to vitiate and validate any presumed agreement on the compensation act *(on which point we express no opinion)*". In Boyd the Court made a similar assumption. In each case the Court held, however, that the petition failed to state a cause of action on the ground that the allegation did not allege such fraud as would vitiate the employee's presumed agreement. In Brooks the Court said that "slipping or sliding of sugar bags piled up in a sugar house is a hazard incident to the operation of a sugar factory and in classifying employment in a sugar factory as a hazardous operation, the law took into consideration all such hazards". Boyd also involved an injury to a workman when a large stack of sugar bags became dislodged and fell on him. Citing Brooks the Court held that "where it was alleged that a field hand assigned to work in a sugar house was not informed of the extra hazards connected with such employ-

ment due to the dangerous conditions of stacks of sugar bags which were known to the employee" that the petition did not allege "such fraud as would vitiate the employee's presumed agreement to be governed by the Compensation Act so as to render the employer liable in tort."

Following the Louisiana law, as this Court is required to do, it seems to us that, assuming the correctness of the plaintiff's theory, the hazard was incident to employment in a refinery such as the Esso Refinery at Baton Rouge. Moreover, as in Brooks, in classifying employment in a refinery as a hazardous occupation the lawmakers took into consideration the risk to which Hoshman was exposed. The fact of the matter is that the complaint alleges negligence, the very situation the Compensation Act was intended to cover. The only paragraph in the complaint that alleges any facts, as distinguished from conclusions of the pleader, is paragraph 9. This reads:

> "That the said accident was caused by the gross and wanton negligence of the agents and employees of defendant company in failing to provide safeguards to the said RUSSELL M. HOSHMAN; in failing to maintain proper lookout for the operation of said crane and in ordering the said RUSSELL M. HOSHMAN to hold onto said pipe well knowing the close proximity of said high powered line and in failing to warn the said RUSSELL M. HOSHMAN of the danger involved.

The averment of fraud is a conclusion of the pleader that there must have been fraud because of Esso's not posting lookouts or informing Hoshman of that fact. But in the absence of something more such an allegation asserts only negligence. There would not be much left of the Louisiana Workman's Compensation Act if courts should equate fraud with negligent failure to post lookouts and the omission to inform a workman of this fact.

The plaintiff contends vigorously that the district court erred in basing its decision on the application of the Louisiana rule in trying an exception of no cause of action instead of applying the federal rules applicable to a motion

to dismiss. The exception of no cause of action in Louisiana addresses itself to the sufficiency of the pleadings and is tried on the face of the pleadings. It is not the same as a motion to dismiss under the federal rules. *Millet v. Godchaux Sugars*, 5 Cir., 1957, 241 F.2d 264. There is nothing to indicate that the able district judge decided the case on any other basis except the federal rules.

"In appraising the sufficiency of a complaint", the Supreme Court has held, "we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". *Conley v. Gibson*, 1957, 355 U.S. 41, 78 S.Ct. 102, 2 L.Ed. 2d 80. Although the liberal federal rules require only notice pleading, they still require a "short and plain statement of the claim showing that the pleader is entitled to relief". Rule 8(a), Federal Rules of Civil Procedure; Moore states:

> "Perhaps it is not entirely accurate to say, as one court has done, that 'it is only necessary to state a claim in the pleadings . . . and not a cause of action.' The pleadings still must state a 'cause of action' in the sense that it must show that the pleader is entitled to relief'; it is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery. However, the courts have ruled time and again that a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient." Moore's Federal Practice, 2d Edition, p. 1653.

A district court need only consider material facts, not unsupported conclusions such as those in the plaintiff's complaint, and when facts show that the claim is without merit there is no need to go to trial. *Dunn v. Gazzola*, 1 Cir., 1954, 216 F.2d 709. See also *McGuire v. Todd*, 5 Cir., 1952, 198 F.2d 60, 63, cert. den. 1952, 344 U.S. 835, 73 S.Ct. 44, 97 L.Ed. 649.

The material fact in this case is that Hoshman was killed as the result of an accident from a hazard incident to employment in an oil refinery. Considering the history and purpose of Workman's Compensation laws [3] we think that it would be an unwarranted distortion of the statute to hold that the complaint alleges facts that would entitle the plaintiff to relief. The plaintiff's brief in this case alleges facts not contained in the complaint or anywhere else in the record.[4] We go further, therefore, and say that the plaintiff is not entitled to relief on the facts alleged in the plaintiff's briefs and on such facts as we can imagine

---

[3] "The history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the keystone was the exclusiveness of the remedy. This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation. As stated by Mr. Justice Brandeis in Bradford Electric Co. v. Clapper, 1932, 286 U.S. 145, 159, 52 S.Ct. 571, 576, 76 L.Ed. 1026, the purpose of these laws was to provide not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinative.' Thus anything that tends to erode the exclusiveness of either the liability or the recovery strikes at the very foundation of statutory schemes of this kind, now universally accepted and acknowledged." Smither and Co., Inc. v. Franciska T. Coles, 1957, D.C. Cir., 242 F.2d 220, 222.

[4] For example, the statement that lookouts had been posted up to the day before the fatal accident.

within the framework of the complaint and consistent with the allegations and conclusions of the complaint.

Judgment is

Affirmed.

A true copy.

Test: EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals, Fifth Circuit.

By CLARA R. JAMES,
Deputy.

New Orleans, Louisiana.

May 22, 1959.

APPENDIX "B"

JUDGMENT

Extract from the Minutes of January 30, 1959.

No. 17298.

MRS. FAY M. HOSHMAN, ETC., et al

versus

ESSO STANDARD OIL COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Mrs. Fay M. Hoshman, and the surety on the cost bond herein, The Aetna Casualty & Surety Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX "C"

ORDER GRANTING MOTION TO DISMISS

MINUTE ENTRY

May 8, 1958

(Number and title omitted)

WRIGHT, J:

This cause came on at a former day, to be heard on the motion of defendant to dismiss, and was argued by counsel for the respective parties and submitted, when the Court took time to consider.

Now, on due consideration thereof,

IT IS ORDERED by the Court that the motion of defendant to dismiss this action be, and the same is hereby, GRANTED.

* * * * * * * *

Authority: La. R. S. 23:1032

APPENDIX "D"

JUDGMENT

MINUTE ENTRY

May 8, 1958

(Number and title omitted)

WRIGHT, J.:

This cause having been heard at a former day, on the motion of defendant to dismiss, and the Court having granted said motion.

IT IS ORDERED, ADJUDGED AND DECREED that judgment be, and is hereby entered, in favor of the defendant, Esso Standard Oil Company, and against the plaintiff, Mrs. Fay M. Hoshman, individually and as natural tutrix of the minors of Russell M. Hoshman, rejecting the demand of said plaintiff and dismissing her suit, with costs.

APPENDIX "E"

Complaint

(Filed: February 26, 1958)

(Number and title omitted)

The complaint of Mrs. Fay M. Hoshman, individually, and as Natural Tutrix of her minor children, with respect, represents:

1

That complainant is a resident and citizen of the State of Louisiana, being domiciled at Baton Rouge therein.

2

That complainant is the duly appointed and confirmed Natural Tutrix of the minor children, Amanda Sue Hoshman, Russell Merrick Hoshman, Jr., Dennis Neil Hoshman and John Dallas Hoshman, having been appointed by the 19th Judicial District Court in and for the Parish of East Baton Rouge, Louisiana, in proceeding 11,711 on the Probate Docket of said Court.

3

Complainant now shows that Esso Standard Oil Company is a corporation organized and existing under the law of the State of Delaware, being domiciled at Wilmington, therein, authorized to do business in the State of Louisiana by having filed the proper credentials with the Secretary of State and having appointed Arthur M. Curtis, Baton Rouge, Louisiana, as its agent for service of process.

4

That this is an action for damages and involves an amount in excess of $3,000.00, exclusive of interest and costs, and is wholly between citizens of different states.

5

That on and prior to March 20, 1957, complainant's husband was employed by defendant company as an apprentice pipefitter.

6

That on or about March 20, 1957, complainant's husband was instructed and ordered by his employer to guide a 40 foot length of 20 inch pipe that was being moved by a crane, from one side of a road to the other side in the plant of defendant company in Baton Rouge, Louisiana.

7

That in accordance with the directions and instructions of the agents and employees of defendant company, the said RUSSELL M. HOSHMAN took hold of the said length of pipe.

8

That the agents and employees of defendant company, acting in the course and scope of their employment operating said crane, caused the length of pipe to come in contact with an overhead power line carrying 13,800 volts of electricity, resulting in the electrocution and immediate death of the said RUSSELL M. HOSHMAN.

9

That the said accident was caused by the gross and wanton negligence of the agents and employees of defendant company in failing to provide safeguards to the said RUSSELL M. HOSHMAN; in failing to maintain proper lookout for the operation of said crane and in ordering the said RUSSELL M. HOSHMAN to hold onto said pipe well knowing the close proximity of said high powered line and in failing to warn the said RUSSELL M. HOSHMAN of the danger involved.

10

Complainant now shows that the said ESSO STANDARD OIL COMPANY concealed such facts from her husband and that

the said RUSSELL M. HOSHMAN was not informed of the extra hazards connected with his employment and was not informed of the unsafe place and conditions of his employment and he was not informed that no precautions or provisions were made to protect him.

11

That the concealment of such extra hazards by his employer constituted fraud, vitiating the presumed agreement of the deceased to be governed by the Compensation Laws of the State of Louisiana.

12

Complainant now shows that her husband was 29 years of age at the time of his death and was earning approximately $450.00 per month.

13

Complainant now shows that as a result of the death of her husband, she has sustained damages which she itemizes as follows, to-wit:

Pain and suffering of her husband prior to his death	$10,000.00
Mental pain and anguish suffered by Complainant	$50,000.00
Loss of love and affection and companionship	$50,000.00

or a total of $160,000.00.

14

For and on behalf of the minor child, AMANDA SUE HOSHMAN, Complainant itemizes the damages sustained by her as follows, to-wit:

Pain and suffering sustained by the deceased prior to his death	$ 2,500.00
Loss of love, affection and companionship	$25,000.00
Loss of support	$25,000.00

or a total of $52,500.00.

15

For and on behalf of the minor child, RUSSELL MERRICK HOSHMAN, JR., Complainant itemizes the damages sustained by him as follows, to-wit:

Pain and suffering sustained by the deceased prior to his death	$ 2,500.00
Loss of love, affection and companionship	$25,000.00
Loss of support	$25,000.00

or a total of $52,500.00.

16

For and on behalf of the minor child, DENNIS NEIL HOSHMAN, Complainant itemizes the damages sustained by him as follows, to-wit:

Pain and suffering sustained by the deceased prior to his death	$ 2,500.00
Loss of love, affection and companionship	$25,000.00
Loss of support	$25,000.00

or a total of $52,500.00.

17

For and on behalf of the minor child, JOHN DALLAS HOSHMAN, Complainant itemizes the damages sustained by him as follows, to-wit:

Pain and suffering sustained by the deceased prior to his death	$ 2,500.00
Loss of love, affection and companionship	$25,000.00
Loss of support	$25,000.00

or a total of $52,500.00.

18

Complainant further shows that she desires a trial by jury on all issues.

WHEREFORE, Complainant prays for service and citation of this petition upon the Defendant and that it be duly cited to appear and answer hereto and after all legal delays and due proceedings had, that there be a judgment

herein in favor of Complainant, FAY M. HOSHMAN, and against defendant ESSO STANDARD OIL COMPANY, in the full sum of $160,000.00, together with legal interest thereon from judicial demand until paid.

Complainant further prays that there be judgment herein in favor of Complainant as Natural Tutrix of the minor, AMANDA SUE HOSHMAN, and against defendant ESSO STANDARD OIL COMPANY, in the full sum of $52,500.00, together with legal interest thereon from judicial demand until paid.

Complainant further prays that there be judgment herein in favor of Complainant as Natural Tutrix of the minor, RUSSELL MERRICK HOSHMAN, JR., and against defendant, ESSO STANDARD OIL COMPANY, in the full sum of $52,500.00, together with legal interest thereon from judicial demand until paid.

Complainant further prays that there be judgment herein in favor of Complainant as Natural Tutrix of the minor DENNIS NEIL HOSHMAN, and against defendant, ESSO STANDARD OIL COMPANY, in the full sum of $52,500.00, together with legal interest thereon from judicial demand until paid.

Complainant further prays that there be judgment herein in favor of Complainant as Natural Tutrix of the minor JOHN DALLAS HOSHMAN, and against defendant, ESSO STANDARD OIL COMPANY, in the full sum of $52,500.00, together with legal interest thereon from judicial demand until paid.

Complainant further prays for a trial by jury on all issues and for all necessary orders and general and equitable relief.

By Attorneys:

s/ H. ALVA BRUMFIELD,
VELMA P. GERDING,
ARTHUR J. COBB,
205 American Bank Building,
Baton Rouge, Louisiana.

LE COPY

FILED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. [redacted] 123

MRS. FAY M. HOSHMAN, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS OF RUSSELL M. HOSHMAN,

Petitioner,

versus

ESSO STANDARD OIL COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 1,008

MRS. FAY M. HOSHMAN, INDIVIDUALLY AND AS NATURAL TUTRIX OF THE MINORS OF RUSSELL M. HOSHMAN,

Petitioner,

versus

ESSO STANDARD OIL COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

May it please the Court:

OPINION BELOW

This is a damage suit. Petitioner's husband was fatally injured during the course of his employment by respondent. The District Court, without opinion, granted respondent's motion to dismiss based on the exclusiveness of the Louisiana workmen's compensation remedy and the Circuit Court of Appeals for the Fifth Circuit affirmed (263 F2d 499).

JURISDICTION

For jurisdiction, petitioner invokes 28 U.S.C., Section 1254, which as here applicable, provides,

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . .

This is a diversity case. It involves solely the question of the exclusiveness provisions of the Louisiana Workmen's Compensation statute as applied to the allegations of the complaint. It is of interest only to the litigants. There is nothing in the petition to bring it within the scope of Rule 19 of this Honorable Court: "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." (*N.L.R.B. v. Pittsburgh Steamship Company*, 340 U.S. 498, 502.) Petitioner not only fails to show any conflicts in decisions below on the question presented but fails to show any decisions, state or Federal, supporting petitioner's position. Additionally, the Federal question of denial of trial by jury was not mentioned in the specification of errors in the appeal to the Fifth Circuit nor raised, other than in the prayer for jury trial, in the District Court.[1]

1. The specification of errors in petitioner's brief to the Court of Appeals for the Fifth Circuit was:

   1. The trial court erred in granting defendant's motion to dismiss and rendering a judgment rejecting complainant's demand and dismissing her suit with costs.

Under the established criteria, this Court is without jurisdiction.

STATUTES AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Louisiana Revised Statutes, Title 23, Section 1032:

"Exclusiveness of rights and remedies; employer's liability to prosecution under other laws.

"The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents or relations.

"Nothing in this Chapter shall affect the liability of the employer to a fine or penalty under any other statute."

Federal Rules of Civil Procedure—Rule 8(a) Claims for Relief:

"A pleading which sets forth a claim for relief, whether an original claim, counter-claim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that

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2. The trial court erred in concluding that the complainant's remedy was exclusively provided by the Louisiana Workmen's Compensation Act and in concluding that she and her minor children did not have a cause of action in accordance with Article 2315 of the Revised Civil Code of Louisiana.

(Petitioner's brief to the Court of Appeals, p. 3.)

the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

QUESTION PRESENTED

The petition sets out five questions. However, the basic question, of which petitioner's phrasings are variants, is the exclusiveness for the claim presented of the remedy provided by the Louisiana Workmen's Compensation statute. For a Federal question, petitioner maintains that dismissal of her claim on motion has denied her the right to trial by jury.

STATEMENT

This diversity suit is a damage action for the death of petitioner's husband during the course of his employment as a pipefitter at respondent's Baton Rouge, Louisiana, oil refinery. The complaint is reproduced as Appendix E of the petition (Petition p. 32). The defense, advanced on a motion to dismiss and sustained below, is the exclusiveness of the remedy provided by the Louisiana Workmen's Compensation statute. The affirming opinion of the Fifth Circuit Court of Appeals is reproduced as Appendix A of the petition. (Petition p. 23)

ARGUMENT

I.

The Decision Below Is Correct.

The opinion below is by Judge John Minor Wisdom, an eminent Louisiana lawyer. The case turns solely on the appli-

cation of the Louisiana law. This Court, in question of local law, gives deference to the decision of the lower Federal courts. (*Williams v. United States*, 341 U.S. 97, 100; *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204-205.)

II.

The Substantive Law of Louisiana Does Not Permit This Action to Be Brought.

Petitioner assigns as reasons for granting of a writ of certiorari (1) that the substantive law of Louisiana permits this action to be brought and (2) that the Fifth Circuit erred in judging the sufficiency of the allegations of the complaint by applying the tests used by the Louisiana Courts instead of the criteria embodied in the Federal Rules of Civil Procedure. We notice these in order.

Petitioner seeks to avoid the exclusiveness of the compensation remedy by alleging, partly in the complaint and partly in memorandum to the trial court, in briefs to the Fifth Circuit and in her petition here, facts which are said to constitute fraud. As we will show, all of these facts, both in the complaint and elsewhere, are in truth but allegations of negligence and the fraud is a conclusion which petitioner's counsel has drawn.

The complaint alleges that petitioner's husband, during the course of his employment by respondent, was electrocuted while guiding a pipe which was being moved by a crane. This accident, according to the complaint, "was caused by the gross and wanton negligence of the employees of respondent in failing to provide safeguards to the said Russell M. Hoshman; in failing to maintain proper lookout for the operation of said

crane, and in ordering the said Russell M. Hoshman to hold onto said pipe, well knowing the close proximity of said high-powered line and in failing to warn the said Russell M. Hoshman of the danger involved." (Paragraph 9, Petition, p. 33)

The next paragraph of the complaint says the respondent concealed "such facts" from petitioner's husband and that her husband "was not informed of the extra hazards connected with his employment and was not informed of the unsafe place and conditions of his employment and he was not informed that no precautions or provisions were made to protect him." (Petition page 33-34)

Then the complaint draws the conclusion: "that the concealment of such extra hazards by his employer constituted fraud, vitiating the presumed agreement of the deceased to be governed by the compensation laws of the State of Louisiana." (Petition p. 34)

The facts alleged are negligent acts. The "gross and wanton negligence" and the so-called fraud are conclusions from these facts. The alleged facts and not the attempted conclusions are the only admissions for the purpose of the motion to dismiss. (*Moore's Federal Practice*, 2nd Ed. Vol. 2, Section 12.08, p. 2244.) If to these facts in the complaint there are added the allegations in petitioner's memorandum to the trial court and in the petition here that respondent had removed lookouts or flagmen prior to the accident, the allegations are still only of negligence.

> "Negligence is the failure to observe, for the protection of another's interests, such care, protection, and vigilance as the circumstances justly demand, and the want of

which causes him injury." It is the failure to observe the care and skill which the situation demands. See "Negligence," 28 Words & Phrases, Perm. Ed., p. 334 (as quoted in *State v. Vinzant*, 7 So. (2d) 917, 922, 200 La. 301, 315).

All the allegations of fact made in the complaint or added or alluded to in petitioner's counsel memorandum and in her petition here are of failure to exercise proper care under the circumstances of the work done by the petitioner's husband.

Negligence of the employer, regardless of the degree, has never been held to "vitiate" the exclusiveness of the compensation remedy under exclusiveness provisions such as in the Louisiana Act. Cases to show that were cited in respondent's memorandum to the trial court which appears in the record (pp. 12-14 of the transcript as printed for the Court of Appeals). We have found no cases in Louisiana, or elsewhere under exclusiveness provisions similar to the Louisiana provision, to the contrary. Neither has petitioner's counsel. The one supporting case cited in petitioner's memorandum to the trial court was reversed on appeal (respondent's supplemental memorandum, transcript pp. 23-27, as printed for the Court of Appeals).

It is only in assault cases, personal assault by the employer on the employee, that the exclusiveness of the workmen's compensation remedy has been held not to apply. The reasons given for this exception vary, but basically it is the unconscionableness of allowing the employer to use the compensation statute as a shield to protect himself against his own personal intentional act. (See Malone, *La. Workmen's Compensation*, 1955 Pocket Part, Section 361, and Larson *The Law of Workmen's Compensation*, Section 68.11). Even this avoidance

of the exclusiveness of the workmen's compensation remedy in employer personal assault cases has not been followed in the one Louisiana case in which it was raised. In *Smith v. Bankston*, 75 So. (2d) 880 (1954), the Louisiana First Circuit Court of Appeals denied recovery in tort for an employer assault holding workmen's compensation to be the exclusive remedy.

Two Louisiana cases are cited by petitioner in her counsel's argument that the substantive law of Louisiana permits this action to be brought, *Clark v. Southern Kraft Corporation*, La. App., 200 So. 489, and *Faulkner v. Milner-Fuller, Inc.*, La. App., 154 So. 507.

Each of these cases involved allegations which tended to show incurrence of disability by employees from occupational disease. At the time of the decisions there was no coverage for occupational disease as such in the Louisiana Workmen's Compensation statute. The question discussed in each opinion is the coverage of the Workmen's Compensation Act as applied to allegations of progressive injury; whether or not there was an accident within the meaning of the compensation statute. The decisions have no application to this case. Petitioner is not claiming that there was no accident within the meaning of the Louisiana statute. It is clear that there was such an accident.

Petitioner's fraud approach was suggested by two Louisiana cases which petitioner here notices under the discussion in the petition of the tests applied to the complaint by the Fifth Circuit. The cases are *Brooks v. American Mutual Liability Ins. Co.*, 7 So.2d 658, and *Boyd v. American Mutual Liability Ins. Co.*, 11 So.2d 102. *Brooks* was an action for

damages and in the alternative for workmen's compensation for the death of plaintiff's husband. The employment was in a sugar factory. The allegations were much the same as here —that the employee unknowingly worked under unsafe conditions and the concealments of the hazards by employer vitiated the implied consent of her husband to the application of the Louisiana Workmen's Compensation Act. The case was dismissed on an exception of no cause of action based on the exclusiveness of the workmen's compensation coverage. The court remarked that "assuming for the sake of argument" an employer could be guilty of such fraud as would prevent coverage by the compensation act, no such fraud was alleged.

The *Boyd* case followed *Brooks* and made a similar assumption.

Petitioner has seized on the assumption in these two cases and claims to have here alleged fraud. As we have discussed above and as fully brought out in the opinion of the Fifth Circuit in this case, what petitioner has done is to allege negligence and from such allegations has attempted to draw a conclusion of fraud.

It is significant, however, that petitioner does not cite a single case where even a specific allegation of employer fraud, a designed, intentional deceit, has been held to take an employee's claim out of the exclusiveness of the compensation coverage. The only decision we have been able to find which appeared to involve such a specific allegation reached an opposite result. In *Greenwalt v. Goodyear Tire and Rubber Co.*, 164 Ohio State 1, 128 NE 2d 116 (1955), it was alleged that the employer had led the injured employee to believe the employer had filed the employee's application for compensa-

tion to the State Industrial Commission and the employee, because of the employer's act, did not discover the deception until the time limit for filing the application had expired. Despite the apparently clear allegation of deceit, the workmen's compensation remedy was held exclusive.

We respectfully submit that petitioner has not shown that this claim would be permitted by the substantive law of Louisiana.

III.

In Judging the Sufficiency of the Allegations of the Complaint, the Fifth Circuit Court of Appeals Applied the Criteria Embodied in the Federal Rules of Civil Procedure and Not the Tests Used by Louisiana Courts.

Petitioner argues at length that the Fifth Circuit, in judging the motion to dismiss, looked at the allegations of the complaint as a Louisiana court would do in passing on an exception of no cause of action instead of considering, as it should have, the Federal rule that a claim should not be dismissed unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.

A quite sufficient answer is the last sentence of the opinion of the Court of Appeals, "We go further, therefore, and say that the plaintiff is not entitled to relief on the facts alleged in the plaintiff's briefs and on such facts as we can imagine within the framework of the complaint and consistent with the allegations and conclusions of the complaint."

Under Rule 8(a) of the Federal Rules of Civil Procedure,

it is still necessary, and obviously so, that the pleader must state a claim showing that the pleader is entitled to relief. "The pleadings must still state a 'cause of action' in the sense that it must show 'that the pleader is entitled to relief'." (Moore's Federal Practice, 2nd Ed., Vol. 2, Section 8.13, p. 1653)

The extended comparison in the petition of the Louisiana and Federal practice in judging the sufficiency of a complaint cannot disguise the fact that the petitioner has not stated a claim here which entitles her to the relief sought. Essentially, petitioner's entire position is predicated on the allegation of failure by the respondent to provide a safe place to work. The so-called fraud argument is but a projection of that allegation. The Fifth Circuit was correct, we submit, in saying that all of the facts which petitioner could possibly urge within the framework of the complaint were facts of negligence.

IV.

There Is No Seventh Amendment Question Involved.

For a Federal question, the petition advances the dismissal of the complaint on motion as a denial of the Seventh Amendment right to trial by jury. On this, the petition says, "In considering a motion to dismiss, if any facts that may be proved would entitle the plaintiff to relief, this amendment (the Seventh) requires a decision by a jury." This seems to be petitioner's whole argument on the applicability of the Amendment. Again, the short answer is the statement in the last sentence of the opinion of the Court of Appeals that there are no facts within the framework of the complaint which would entitle petitioner to relief. There can be no jury ques-

tion if there are no facts which would entitle petitioner to relief.

"The right (of jury trial) does not exist with respect to a complaint or declaration as to which dismissal or non suit is proper or with respect to facts as to which there is no traverse and as to which the defendant has defaulted." (31 American Jurisprudence, Verbo "Jury" Section 15, p. 22)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Einar B. Paust, attorney for respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief on Petitioner by depositing same in the United States Post Office, air mail postage prepaid, addressed to the Honorable Warren E. Miller, Suite 1012, Barr Building, 910 Seventeenth Street N.W., Washington D. C., and Honorable H. Alva Brumfield, 205 American Bank Building, Baton Rouge, Louisiana, attorneys of record for Petitioner.

Dated this 10th day of July, 1959.

EINAR B. PAUST